

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB      NOV. 22, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Arnita Y. Boswell and James W. Clement

v.

Mavety Media Group Ltd.

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Opposition No. 99,058  
to application Serial No. 74/066,893  
filed on June 7, 1990

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Request for Reconsideration

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James W. Clement, pro se and as attorney for Arnita Y.  
Boswell

Lawrence E. Abelman of Abelman Frayne Rezac & Schwab for  
Mavety Media Group Ltd.

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Before Cissel, Seeherman and Hohein, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Arnita Y. Boswell has requested reconsideration of the  
Board's decision, mailed July 28, 1999, dismissing her  
opposition to the registration of the mark BLACK TAIL for  
adult entertainment magazines. The request for

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reconsideration specifically states that the request is filed only by opposer Boswell, and not by opposer James W. Clement; further, the request states that opposer Boswell is limiting the ground of disparagement to the impact on a substantial composite of the African American female community. In other words, opposer Boswell's basis for the opposition and her request for reconsideration of our decision has been limited to the assertion that applicant's mark "consists of or comprises ... matter which may disparage ..." African American females.

In her request for reconsideration opposer has abandoned the three-part test suggested in her brief, which was written prior to the Board's decision in **Harjo v. Pro Football Inc.**, 50 USPQ2d 1705 (TTAB 1999). Instead, she has discussed her assertion of disparagement in terms of the test set forth in Harjo. That test, as noted in our opinion in the present opposition, involves a two-step process, which requires that we first ask what is the meaning of the matter in question, and, second, whether that meaning may be disparaging, i.e., whether the mark may dishonor by comparison with what is inferior, or slight, deprecate, degrade, or affect or injure by unjust comparison. Slip op., p. 14.

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As opposer admits, there are non-vulgar as well as vulgar meanings of "tail" which could be considered relevant to an adult entertainment magazine. However, opposer asserts that because of the nature of applicant's goods, the Board committed error in stating that "in view of the existence of an alternate, non-vulgar definition of 'tail,' we cannot conclude that it is the vulgar meaning that the relevant public would attach to the mark."

We reiterate the statement made in our opinion:

...our principal reviewing Court stated quite clearly in Mavety [**In re Mavety Media Group Ltd.**, 33 F.3d 1367, 31 USPQ2d 1923, 1928 (Fed. Cir. 1994), which reversed the Board's finding that the mark involved in this application was scandalous] that, in view of the existence of an alternate, non-vulgar definition of "tail," the Board, without more, erred in concluding that in the context of an adult entertainment magazine, a substantial composite of the general public would necessarily attach to the mark BLACK TAIL the vulgar meaning of 'tail' as a female sexual partner, rather than the admittedly non-vulgar meaning of 'tail' as rear end.

Slip op. p. 22.

Although opposer, in her request for reconsideration, characterizes the finding of the Court of Appeals for the Federal Circuit in Mavety as "erroneous," p. 4, fn. 2, we are not only bound by the Court's decision, but see no

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reason in this case not to apply the Court's reasoning that when there are both vulgar and non-vulgar dictionary definitions which are relevant to the specific goods, in order to establish that the vulgar meaning would be the one attributed to the term, something must be of record to show that a substantial composite of the relevant public would attribute that meaning to the mark. Opposer had an opportunity at trial to demonstrate the meaning to be ascribed to the mark by the relevant public and, despite the clear language of the Court in Mavety, chose to rely only on dictionary definitions and copies of various adult entertainment magazines, including applicant's. As we stated in our opinion, opposer has failed to prove that a substantial composite of the relevant public would attach the vulgar meaning to applicant's mark.

Nor do we see any error in our finding that opposer failed to prove that African American women believe themselves disparaged by applicant's mark for adult entertainment magazines. Opposer essentially employs circular reasoning, asserting that because several dictionary definitions characterize certain meanings of "tail" as vulgar, that automatically proves that the term would be disparaging. However, as we stated above, and in our opinion, opposer has failed to prove that it is the

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vulgar meaning of "tail" that the relevant public would attach to applicant's mark. Opposer raises concerns about what she might have been subjected to during cross-examination if she were to have provided oral testimony "as to why she feels disparaged and deprecated by the use of the trademark BLACK TAIL..." p. 8, and that "any reasonable person of ordinary sensibilities, including the members of the Board, should understand Opposer's feelings completely without the elaboration that would be provided by her oral testimony." p. 9.

It is not our role here to say whether a particular witness is required to provide testimony, or what evidence might be persuasive. We note only that in an opposition proceeding, it is the opposer's burden to prove that a mark should not be registered. That burden does not change depending on whether it might upset an opposer's sensibilities to provide testimony.

Opposer's request for reconsideration is denied.

R. F. Cissel

E. J. Seeherman

G. D. Hohein  
Administrative Trademark Judges  
Trademark Trial and Appeal Board